Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

JESUS MORTERA-CRUZ,

Petitioner,

v.

ALBERTO R. GONZALES,
U.S. ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether 8 U.S.C. § 1182(a)'s savings clause renders 8 U.S.C. § 1182(a)(9)(C)(i)(I) inapplicable to aliens adjusting their status pursuant to 8 U.S.C. § 1255(i), when section 1255(i) allows aliens to adjust their status – even though they entered the country without inspection – and section 1182(a)(9)(C)(i)(I) provides that some of the same aliens are inadmissible based, in part, upon their entering into the United States without inspection?

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Opinions Below	1
Jurisdictional Statement	1
Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Accepting Certiorari	9
Conclusion	17

TABLE OF AUTHORITIES

Page

CASES CITED

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 14, 15

Berrum-Garcia v. Ashcroft, 390 F.3d 1158 (10th Cir. 2004) 10

Lattab v. Ashcroft, 384 F.3d 8 (1st Cir. 2004) 10

Matter of Velasquez, 2004 WL 2952152 (BIA 2004) 10

Mortera-Cruz v. Gonzales, 409 F.3d 246 (5th Cir. 2005) 1, 9, 13, 15

Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004) 9, 10

STATUTES CITED

8 U.S.C. § 1182(a) 1, 3, 4, 14

8 U.S.C. § 1182(a)(6)(A)(i) 2, 4, 6, 15

8 U.S.C. § 1182(a)(9)(C)(i)(I) ..... *passim*

8 U.S.C. § 1252 8

8 U.S.C. § 1255(i) ..... *passim*

28 U.S.C. § 1254(1) 1

OTHER AUTHORITIES CITED

The Joint Memorandum Concerning the Legal Immigration Family Equity Act of 2000 and the LIFE Act Amendments of 2000, 146 Cong.Rec S11850-11853 ..... 11, 12

TABLE OF AUTHORITIES – Continued

Page

Memorandum from INS Office of General Counsel to Michael Aytes, Associate Commissioner, Office of Benefits, "Request for Legal Opinion: The Impact of the 1996 Act on Section 245(i) of the Act," Feb. 19, 1997 4

Memorandum by Louis D. Crocetti, Jr., INS Assoc. Comm'r (May 1, 1997), for a conclusory review 5

OPINIONS BELOW

The opinion of the court of appeals denying the petition for rehearing en banc is unreported. The opinion of the court of appeals dismissing Mortera's petition for review is reported at 409 F.3d 246. The Board of Immigration Appeals' decision is unpublished.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on May 9, 2005. The court denied Mortera's motion for rehearing en banc on June 7, 2005. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1255(i), added by section 506(b) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of August 26, 1994, Pub. L. No. 103-317, 108 Stat. 1724, as amended by section 111(b), "Repeal of Sunset for Section 245(i) Act" on November 26, 1997, Pub. L. No. 105-119, 111 Stat. 2458, as amended further by the "Legal Immigration Family Equity Act" of December 21, 2000, Pub. L. No. 106-553, 114 Stat. 2762. Full text located in the appendix.

8 U.S.C. § 1182(a)'s savings clause provision, as amended by section 7(c) of October 20, 1976, Pub. L. No. 94-571, 90 Stat. 2706 and by section 603(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. Relevant text located in the appendix.

8 U.S.C. § 1182(a)(6)(A)(i), as amended by section 301(c)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act, enacted on September 30, 1996. Full text located in the appendix.

8 U.S.C. § 1182(a)(9)(C)(i)(I), added by the Illegal Immigration Reform and Immigrant Responsibility Act, enacted on September 30, 1996. Full text located in the appendix.

STATEMENT OF THE CASE

The courts of appeals are split over the following exceptionally important question of law: whether aliens adjusting their status pursuant to section 1255(i) are inadmissible under section 1182(a)(9)(C)(i)(I). Disregarding the plain reading of the statutes, and ignoring the Congressional intent behind section 1255(i), the lower court in this case determined that section 1255(i) eligible aliens are inadmissible to the United States under section 1182(a)(9)(C)(i)(I). This decision needlessly separates family members from United States citizens and lawful permanent resident aliens. By law, the separation is for a period of at least ten years, a permanent bar for some. As such, this case presents a question of exceptional importance and merits Supreme Court review.

Mortera contends that section 1182(a)(9)(C)(i)(I) should not apply to aliens adjusting their status under section 1255(i). Section 1182(a)(9)(C)(i)(I) requires both one year of unlawful presence *and* a subsequent illegal entry in order to apply. Section 1255(i), on the other hand, allows aliens to adjust their status to lawful permanent residence, even if they entered the country without inspection. Section

1255(i) expressly negates the second element required for the application of section 1182(a)(9)(C)(i)(I) – the illegal entry. The court should resolve this conflict by applying section 1182(a)'s savings clause, which says section 1182(a)(9)(C)(i)(I) applies "except as otherwise provided in this Act. . . . " Insofar as section 1255(i) specifically "provides otherwise" than section 1182(a)(9)(C)(i)(I), the inadmissibility ground is inapplicable to aliens adjusting their status under section 1255(i).

(a) Legislative history of §§ 1255(i) and 1182(a)(9)(C)(i)(I).

Prior to section 1255(i)'s enactment, aliens who entered the country illegally were unable to adjust their status in the United States; they were forced to travel to their home country to obtain an immigrant visa from the United States consular posts. This scheme caused the needless separation of families, as immigrants were forced to leave their families for a significant period of time in order to complete the consular process. Section 1255(i) was enacted in 1994; it provided a mechanism by which aliens who entered the country illegally could obtain their visas in the United States without having to separate from their family members in the United States to complete the consular process. Indeed, the main purpose behind section 1255(i) was the promotion of family unity.

When the original version of section 1255(i) was enacted there was no ground of inadmissibility in section 1182(a) pertaining to aliens who entered the country without inspection. With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in 1996, Congress passed two inadmissibility grounds relating to aliens who entered the country without inspection. First,

section 1182(a)(6)(A)(i) provides that all aliens who entered the United States without inspection are inadmissible. Second, section 1182(a)(9)(C)(i)(I) provides that an alien who is unlawfully present in the United States for over one year, leaves the country, *and* then reenters the country without inspection is inadmissible for a period of ten years. Insofar as these grounds of inadmissibility both require an illegal entry in order to apply, they, at times, directly contradict section 1255(i), which allows aliens to adjust their status, even though they entered the country without inspection.

Two important subsequent developments occurred in the construction of the interplay between these inadmissibility grounds and section 1255(i). First, the Immigration and Naturalization Service ("INS"), now the Department of Homeland Security ("DHS"), determined that section 1182(a)(6)(A)(i) is not applicable to section 1255(i).[1] The government recognized that (1) Congress did not intend to repeal section 1255(i) with the IIRIRA and (2) to apply section 1182(a)(6)(A)(i) to aliens eligible to adjust under section 1255(i) would render section 1255(i) meaningless. To prevent this occurrence, the government issued a policy statement saying section 1182(a)'s savings clause renders section 1182(a)(6)(A)(i) inapplicable to aliens adjusting their status under section 1255(i). Insofar as section 1255(i) specifically provides otherwise than what is stated in section 1182(a)(6)(A)(i), the government rightly concluded that this ground of inadmissibility is inapplicable to aliens adjusting under section 1255(i).

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[1] *See* Memorandum from INS Office of General Counsel to Michael Aytes, Associate Commissioner, Office of Benefits, "Request for Legal Opinion: The Impact of the 1996 Act on Section 245(i) of the Act," Feb. 19, 1997.

The second development relevant to this case was the passage of the Legal Immigration Family Equity Act ("LIFE") on December 21, 2000. The LIFE Act extended the time period by which aliens could apply for benefits under section 1255(i) from January 14, 1998 to April 30, 2001. The LIFE Act also increased the penalty fee for section 1255(i) applicants to $1,000. Like its predecessor, this version of section 1255(i) specifically allows aliens who entered the United States without inspection to adjust their status. The purpose for the extension, as with the original version of section 1255(i), was family unity. Because section 1255(i) still allows aliens to adjust their status, even though they entered the country without inspection, it occasionally contradicts with section 1182(a)(9)(C)(i)(I) insofar as the inadmissibility ground requires an illegal entry in order for it to apply. The DHS has not produced a position memo on how section 1182(a)(9)(C)(i)(I) should interact with section 1255(i).[2]

(b) Factual Background

Jesus Mortera-Cruz, a thirty-four year old citizen of Mexico, is married to United States citizen Margarita Mortera and is the father of three United States citizen children. An immigration judge denied Mortera's application to adjust his status under section 1255(i) because he determined that Mortera was inadmissible under section 1182(a)(9)(C)(i)(I). Mortera is presently under an order of removal. If this order is left undisturbed, Mortera will be separated from his United States citizen wife and three

[2] *See*, however, Memorandum by Louis D. Crocetti, Jr., INS Assoc. Comm'r (May 1, 1997), for a conclusory review.

United States citizen children for a period of at least ten years.

Mortera first entered the United States in November 1996. He and his wife married on March 28, 2001, while Mrs. Mortera was still a lawful permanent resident of the United States. Mrs. Mortera filed a petition for immigrant visa, naming her husband as the beneficiary on April 28, 2001. The visa petition qualified Mortera for benefits under section 1255(i) because it was filed before April 30, 2001, he paid a $1,000 penalty, and he was physically present in the United States on December 21, 2000. On January 14, 2003, Mrs. Mortera became a naturalized citizen of the United States. The visa petition she filed for her husband was approved on January 14, 2003. As such, a visa is immediately available for Mortera and he is eligible to adjust his status under section 1255(i).

On April 16, 2002, Mortera was convicted for illegally entering the United States. The criminal complaint alleged that Mortera entered the United States "on or about June 10, 2001." He pled guilty to this offense and was placed in a removal proceeding.

(c) Procedural History

(i) Before the Immigration Court

The Department of Homeland Security ("DHS") initiated these removal proceedings on May 6, 2002 by filing a notice to appear ("NTA") against Mortera with the Immigration Court in San Antonio, Texas. The NTA alleged that Mortera was removeable from the United States as an alien who entered the country without inspection on or about June 10, 2001. *See* 8 U.S.C. § 1182(a)(6)(A)(i). On

September 25, 2002, Mortera had a hearing before the Immigration Judge ("IJ"). The NTA was amended to show that Mortera entered the country illegally on or around November 1, 1996, in lieu of June 10, 2001. The change was made because Mortera contended that the entry date on the criminal complaint was inaccurate. With the NTA amended, Mortera admitted that he entered the United States without inspection on or around November 1, 1996. The IJ then scheduled Mortera a hearing to consider his application to adjust his status pursuant to section 1255(i).

On August 29, 2003, the IJ denied Mortera's application for adjustment of status, claiming that he was inadmissible under section 1182(a)(9)(C)(i)(I). The IJ determined that Mortera first entered the United States in November 1996 as established by his pleadings to the NTA. The IJ then determined that Mortera made a subsequent illegal entry on June 10, 2001 as established by the criminal complaint issued in the criminal case. As such, the IJ concluded that Mortera accumulated over one year of unlawful presence, left the United States, and returned illegally. Therefore, the IJ ruled that Mortera was inadmissible under section 1182(a)(9)(C)(i)(I) and denied his application for adjustment of status. The IJ did not address Mortera's argument that section 1255(i) trumps the application of the inadmissibility ground. After denying Mortera's request for voluntary departure, the IJ ordered Mortera removed from the United States.

(ii) Before the Board of Immigration Appeals

On September 25, 2003, Mortera timely appealed the IJ's decision to the Board of Immigration Appeals ("BIA"). On appeal, Mortera contended that aliens eligible to